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COURT OF CRIMINAL APPEALS
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NO.: PD-0478-19

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/9/2022
DEANA WILLIAMSON, CLERK

EX PARTE LEONARDO NUNCIO, Appellant

Appeal from Webb County, Texas

MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

COMES NOW, Leonardo Nuncio, Appellant and Movant in this case, by and through his attorney of record, Oscar O. Peña, and pursuant to Rule 79 of the Texas Rules of Appellate Procedure, files this motion for reconsideration and would show this Honorable Court the following:

1. Petitioner challenged a portion of Texas's obscene harassment statute, Texas Penal Code 42.07(a)(1) and (b)(3), as unconstitutionally vague and overbroad.
2. The panel concluded that Texas Penal Code section 42.07(a)(1) is a content-based regulation of speech implicating the First Amendment.
3. The panel also concluded that Texas Penal Code 42.07 (a)(1) is "potentially overbroad" by incorporation of the definition of obscene under Texas Penal Code 42.07(b)(3).

4. The panel also concluded that Texas Penal Code 42.07(b)(3)'s definition of obscenity includes both protected and unprotected speech.
5. But then, the panel stated, in a published opinion, that the overbreadth argument was not briefed because Nuncio misunderstood the burden of persuasion.
6. The panel noted that, because of the misunderstanding, Nuncio did not attempt to demonstrate from the text and from fact that a substantial number of instances exist in which the law cannot be applied constitutionally.[1]
7. In its published opinion, the Court stated: "[Movant] does not attempt to make the required showing that a substantial amount of protected speech is affected by the statute, beyond it's plainly legitimate sweep."

Nuncio respectfully requests a rehearing and presents this motion in support wherein he demonstrates to the Court that:

1. a substantial number of instances exist in which Texas Penal Code 42.07(a)(1) and (b)(3) cannot be applied constitutionally, and
2. a substantial amount of protected speech is affected by the statute, beyond its plainly legitimate sweep including, but not limited to, strong rebukes, metaphors, double-entendres, and other expressions of disapproval and figures of expression.

[1] *citing* New York State Club Ass'n v. City of New York, 487 U.S. 1, 14 (1988)

Metaphor and Mockery: Anthony Scaramucci's Rant

An article appeared in the New York Times website on Saturday July 27, 2017 entitled: "Anthony Scaramucci's Uncensored Rant: Foul Words and Threats to Have Priebus Fired."[2] The article describes comments made through a reporter by Anthony Scaramucci, sometimes referred to as 'the Mooch", at the time a Senior Republican Political Advisor.

Scaramucci disparaged a fellow White House adviser, saying:

"I'm not Steve Bannon. **I'm not trying to suck my own cock**…"

On the following day, July 28, 2017, The New York Times published a follow up article online entitled "Why the Times Published Scaramucci's Profanities"[3] explaining its decision to publish Scaramucci's comments. It stated:

> "Scores of our readers expressed surprise when they saw that we published the vulgar comments…[w]hile many applauded the decision, some were outraged and others were simply confused...

One reader commented:

> "…I can't help but feel that the Times's devotion to maintaining a certain level of decorum in an extremely crass world is a significant part of what makes it unique and special."

The Times explained that prior to publishing Scaramucci's comments, their top editors "discussed whether it was proper."

[2] https://www.nytimes.com/2017/07/27/us/politics/scaramucci-priebus-leaks.html
[3] https://www.nytimes.com/2017/07/28/reader-center/times-published-scaramucci-profanities.html

The readers' reactions suggest that the language was "patently offensive." The New York Times' difficulty in deciding whether to publish the "vulgar" comments also suggests that the language was "patently offensive." Also, Scaramucci's rapid termination after only ten days,[4] and soon after the making of the vulgar comments, would tend to show that his vulgarities were judged by the community standards inside the Beltway and found to be patently offensive—but no one called for Scaramucci's arrest.

Nevertheless, the communication was initiated, was communicated through another, was targeted, was intended to embarrass Steve Bannon, and it arguably contained a patently offensive description of combined masturbation and fellatio.

Yet, "suck my own cock" is simply a metaphor for grandstanding, overconfidence, and/or self-promotion.[5] And it's clear from context that Scaramucci meant it as metaphor. Nevertheless, Scaramucci's rant meets the elements of the statute. His intent was to annoy and embarrass Steve Bannon by using colorful language. That would place Scaramucci within the ambit of 42.07(a)(1) and (b)(3).

This example demonstrates to the Court that a substantial number of metaphors and figures of speech, including but not limited to, "suck your own cock," "eat me," "go fuck yourself," and other figures of speech exist to which Texas Penal

[4] https://www.bbc.com/news/world-us-canada-40684697
[5] https://www.urbandictionary.com/define.php?term=sucking%20my%20own%20dick

Code 42.07(a)(1) and (b)(3) cannot be applied constitutionally. The statute's potential application against protected metaphorical and figurative speech is outside the statute's plainly legitimate sweep and that metaphorical and figurative speech make up a substantial component of human communication beyond the legitimate sweep of the statute.

Double Entendre and Rebuke: Ice Cube's "No Vaseline"

In 1991, after leaving the band N.W.A. to pursue a solo career, the rap artist Ice Cube released a song entitled "No Vaseline" which contained lyrics about his former bandmates, Dr. Dre, Easy-E, and M.C. Ren. The music video for the song can be found on Youtube.com.[6]

In the song, Ice Cube delivers the following lines: **"Ay yo Dre, stick to producing… Easy-E saw your ass and went in it quick…"**

On one level, the artist is saying that the target is getting taken advantage of. On another level, it's a reference to anal sex. Unlike the Scaramucci instance, this communication is not channeled through a third party, like a reporter. Instead, it is a direct rebuke: "Yo Dre," the artist proclaims.

Later in the song, Ice Cube utters the following lyrics: **"And Easy's Dick, is smelling like MC REN's shit."** Again, he's being very direct about the targets of the communication, MC Ren and Easy E, Ice Cube's former bandmates. This is not an

[6] https://www.youtube.com/watch?v=csm6jilQwcw

interview with a reporter—it is a direct rebuke using graphic, descriptive language, referencing anal sex between the two targets of the comment. It is meant to embarrass or annoy. Under this framework, Ice Cube initiated a communication to the targets, targeted the communication, had the intent to embarrass or annoy, and graphically described conduct that was an arguably patently offensive description of anal intercourse. Therefore, Ice Cube would be subject to prosecution in Texas, had it occurred in Texas.

Attack and Accusation: Tupac Shakur's "Hit 'Em Up"

During the mid-1990's two rap artists, Tupac Shakur and Christopher Wallace (aka Biggie Smalls) were engaged in a personal feud wherein the obscene statements were even more personal than Scaramucci's rant. Tupac Shakur released a song entitled "Hit 'Em Up" that opens with the following line: **"I fucked your bitch, you fat motherfucker…"**[7]

In the music video[8] Shakur is depicted whispering the following lyrics into Biggie Smalls' ear: "**You claim to be a player, but I fucked your wife**." He then references Biggie Smalls by name in the song.

"I fucked your wife" is clearly a harassing statement. It is similar to the language at issue in Jasper v State.[9] In Jasper, the harassing statement by the accused was that the

[7] "Hit 'em Up"". "How Do U Want It" (CD). Tupac Shakur. Death Row Records. 1996
[8] https://www.youtube.com/watch?v=ylIH6CXSrNg
[9] Jasper v State, 01-13-00799-CR, 2014 WL 265699, at 2–3 (Tex. App.—Houston [1st Dist.] Jan. 23, 2014, no pet.)(*unpublished*).

victim's husband "didn't like fucking [the victim]. He liked fucking [the defendant] better."

The Jasper Court held this to be sufficient evidence of obscenity to uphold the conviction.

Under this framework, Shakur initiated a communication to the target, targeted the communication, had the intent to embarrass, and described conduct that was a patently offensive description of sexual intercourse under Jasper v State, and would therefore—be subject to prosecution in Texas.

Catharsis and Disapproval: Dr. Dre's "Fuck wit Dre Day"

On May 20, 1993, Dr. Dre, formerly of NWA, and his new protégé Snoop Doggy Dogg, taunted Dr. Dre's former bandmate Easy E[10] by chanting "**We want Eazy…"** in the song "Fuck wit Dre Day". Then Snoop Doggy Dogg delivers the line: **"I'm hollering 187 with my dick in your mouth beeatch**." Later in the song, the patently offensive lyrics continue "**Easy E can eat a big fat dick**."[11]

The lyrics express disapproval of Easy E. Arguably, the language used by Dr. Dre is efficient and cathartic in expressing disapproval. Conversely, it would subject him to prosecution in Texas because it was initiated by Dr. Dre, it was meant to embarrass, it was direct, it was targeted, and it contained a patently offensive description of an ultimate sex act involving fellatio.

[10] https://en.wikipedia.org/wiki/Fuck_wit_Dre_Day_(And_Everybody%27s_Celebratin%27)
[11] https://www.youtube.com/watch?v=s38O65mUotU

Sexual Overture: "I Eat Ass" Arrest

The phrase "I eat ass" describes anilingus, which is one of the enumerated ultimate sex acts described in (b)(3). However, according to the online "Urban Dictionary" the phrase ""I Eat Ass" is a pickup line commonly used by men who wish to be direct with their romantic partners.""[12] Doing an online search on Etsy, one can find 597 results for "I eat ass sticker."[13]

On May 5, 2019 in Columbia County, Florida, Dillon Shane Webb was arrested for displaying a sticker on his vehicle that said: "I EAT ASS"[14]. Four days later, the State Attorney stated that all charges had been dropped and that the sticker was protected by the First Amendment.[15] There is a video of the detention and arrest of Webb that has been posted on YouTube.com and it has received 655,155 views as of Monday, May 2, 2022 at 11:22 p.m.[16] If one google searches "I eat ass" the shopping results include numerous buttons, hoodies, stickers, t-shirts, coffee mugs. Under the statute, displaying the message on a t shirt to annoy someone is prosecutable. Sending the shirt to someone as a gag gift to annoy them would be prosecutable.

Webb's above-described arrest illustrates the realistic, non-fanciful danger that the statute will be unconstitutionally applied. Webb initiated a public communication

[12] https://www.urbandictionary.com/define.php?term=I%20eat%20ass
[13] https://www.etsy.com/market/i_eat_ass_sticker, accessed on May 2, 2022
[14] https://www.orlandoweekly.com/news/charges-dropped-against-florida-man-arrested-for-i-eat-ass-sticker-on-his-truck-25294381
[15] Id.
[16] https://www.youtube.com/watch?v=jbh29Pv9afk.

with a window sticker on his truck. In Texas, Webb could have been prosecuted under Texas Penal Code 42.07(a)(1) and (b)(3). Movant further suggests that such a prosecution would involve protected speech and that it would be clearly outside the plainly legitimate sweep of Texas Penal Code 42.07(a)(1) and (b)(3).

Plainly Legitimate Sweep

A law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[17] The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep,"[18] suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[19] An overbroad statute infringes on a substantial amount of constitutionally protected speech when there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment

[17] Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449, n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)(internal quotation marks omitted), United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010)
[18] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)
[19] *id.*, at 613. See also Virginia v. Black, 538 U.S. ___, ___ (2003); New York v. Ferber, 458 U.S. 747, 769, n. 24 (1982); Dombrowski v. Pfister, 380 U.S. 479, 491, and n. 7, 497 (1965)

protections of parties not before the Court,"[20] or the statute is "susceptible of regular application to protected expression"[21]

Clearly, Texas Penal Code 42.07(a)(1) and (b)(3) encompass some criminal conduct within their "plainly legitimate sweep." Movant suggests that the prosecution of obscene harassment forms the core of 42.07(a)(1) and (b)(3)'s plainly legitimate sweep.[22] However, the challenged statute criminalizes conduct that would not generally be considered 'criminal' by people of ordinary intelligence—arguably, like the examples provided above involving Scaramucci, Dr. Dre and the others. Furthermore, the text of the statute chills emotional speech, hyperbolic speech, metaphor, sharply critical speech, and sexual overtures because it does not take into consideration factors like continuity of action, context, notice, and persistence and. Because of this, the statute legislates beyond its core, it's plainly legitimate sweep, and infringes on a substantial amount of protected speech involving, among others, emotional speech, cathartic speech, figures of speech, metaphor, rebukes, double-entendres and romantic overtures. The statute is overbroad in that it punishes and chills emotional speech, rebukes, sexual overtures, metaphors and other figures of speech that are protected. Nuncio argues that the overbreadth stems, in part, from the statute's failure to include

[20] *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)
[21] *City of Houston v. Hill*, 482 U.S. 451, 467, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). United States v. Hansen, 25 F.4th 1103, 1109–10 (9th Cir. 2022)
[22] *cf.* United States v. Hansen, 25 F.4th 1103, 1109 (9th Cir. 2022)

any normative factors typically associated with harassment like (1) continuity of offensive action, or (2) notice requirements, or (3) persistence of the offensive action despite notice.

The above examples demonstrate how 42.07(a)(1) and (b)(3) prohibit a substantial amount of protected expression and that there is a realistic danger that the statute will be unconstitutionally applied.[23]

Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, Leonardo Nuncio and undersigned counsel pray that the Court of Criminal Appeals grant a rehearing and/or rehearing en banc. Nuncio also prays for general relief and/or any relief to which the Court of Criminal Appeals finds that he is entitled or that he has requested herein.

Respectfully Submitted,

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[23] Ex Parte Perry, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016)

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I hereby certify that one true and correct electronic copy of this document was delivered to all counsel as required by the applicable rules of procedure, either via, hand delivery, U.S. First Class Mail and/or certified mail, facsimile transmission, and/or email transmission sent from Oscar O. Peña Law, PLLC on May 5, 2022.

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